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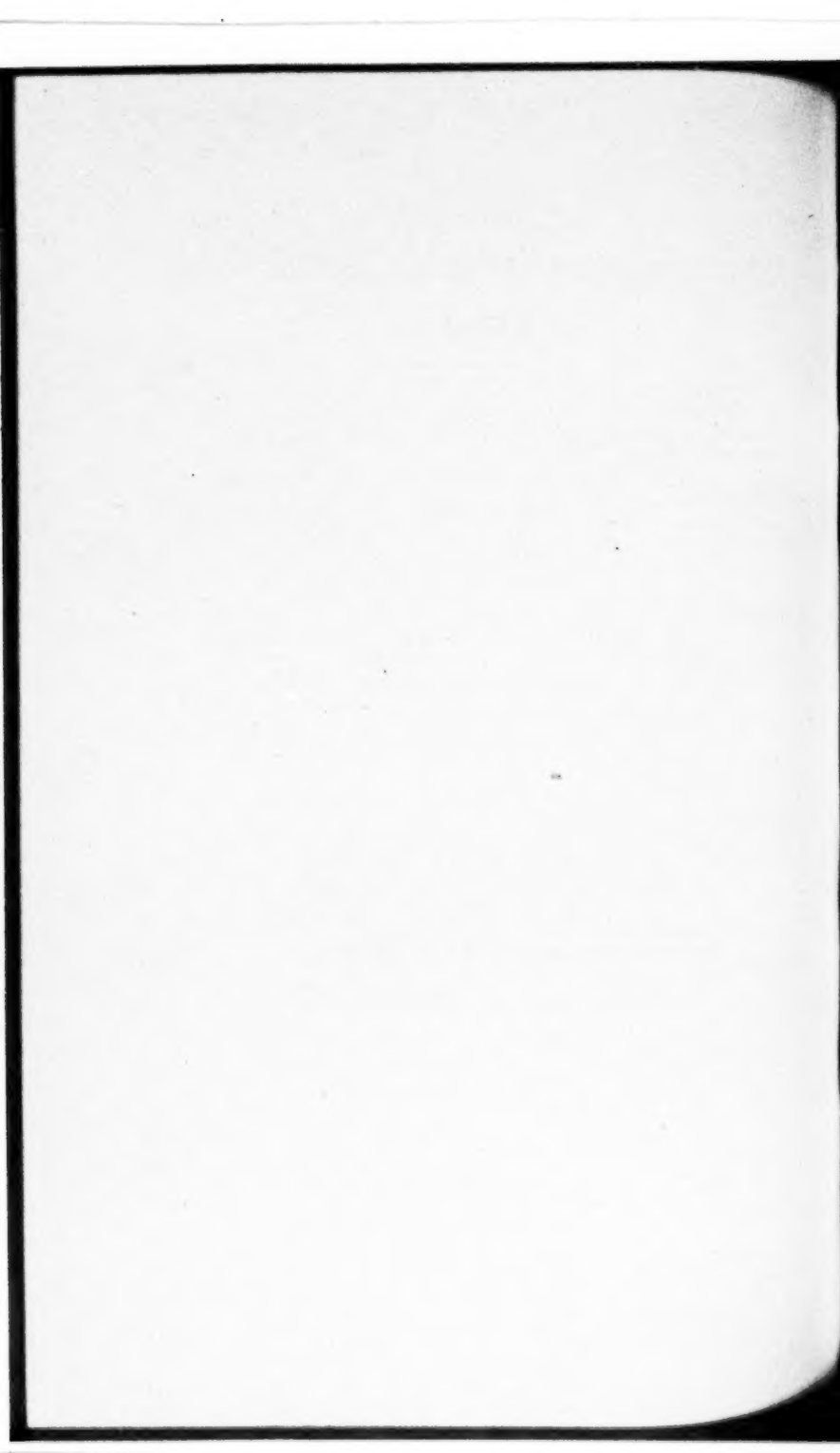
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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 564

WILLIAM WATT SUMMERS, PETITIONER

v.

NATHAN A. MCCOY, UNITED STATES POSTMASTER
AT COLUMBUS, OHIO

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

No opinions were written by the courts below. The order of the United States District Court for the Southern District of Ohio, Eastern Division, denying petitioner's prayer for relief appears at R. 194. The judgment of affirmance of the Circuit Court of Appeals for the Sixth Circuit appears at R. 205.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 21, 1947 (R. 205). A petition for rehearing was denied January 5, 1948 (R.

215). The petition for a writ of certiorari was filed February 2, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the finding of the Acting Postmaster General based upon the testimony of a post office inspector, a chemist and a medical expert who had made a special study of prostatic diseases, that petitioner was "engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises" in the sale through the mails of suppositories for use in connection with prostate gland difficulties, was supported by substantial evidence.¹

STATUTES INVOLVED

The statutes involved, 39 U. S. C. §§ 259, 732 (R. S. 3929, 4041, as amended by the Act of September 19, 1890, c. 908, §§ 2, 3, 26 Stat. 465, 466, and by the Act of March 2, 1895, c. 191, § 4, 28 Stat. 963, 964), are set forth in Appendix, *infra*, pp. 8-10.

STATEMENT

Petitioner brought this action to enjoin the United States postmaster at Columbus, Ohio,

¹ Petitioner, neither here nor in the courts below, raised any of the constitutional questions considered by this Court in the reargument of *Donaldson v. Read Magazine, et al.*, No. 50, this Term.

from carrying out a fraud order issued by the acting postmaster general with respect to petitioner (R. 8). Petitioner is engaged in the sale through the mails of a preparation called "Watt's Suppositories" (R. 2). Petitioner's advertising material is directed to persons suffering from "prostate gland trouble," refers to purported symptoms of an inflamed prostate gland such as "deep, lasting backaches," "lumbago," "a general tired feeling—lackadaisical—not having the pep you feel that you should have," and "getting up nights," and suggests that use of the suppositories will afford relief from the symptoms of an enlarged and inflamed prostate gland (R. 9, 10). Petitioner was charged with conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises in selling the suppositories and representing that their use would eliminate prostate gland difficulties and the symptoms described (R. 4, 11-12). At the fraud order hearing before the Post Office Department, a post office inspector testified to his receipt of petitioner's preparation and advertising literature as a result of test correspondence with petitioner (R. 47-56). A chemist employed at the Pure Food and Drug Administration testified that a sample suppository contained 1.2 grains of extractive matter, probably phytolacca, in a base of cocoa butter and white beeswax

(R. 63-64). Petitioner's label describes the preparation as containing phytolacca in a bland emollient base (R. 49). A medical officer of the Pure Food and Drug Administration, who had made a special study of prostatic diseases and abnormalities (R. 58, 80), testified at length with respect to disorders of the prostate gland and their causes (R. 57-63, 64-88). His testimony was that the medical profession was well agreed on the limitations of suppositories in the treatment of prostatic troubles, that he was informed of the medical consensus in this field, and that in his view petitioner's treatment was "worthless therapeutically for prostatic disease" (R. 80, 83, 84). He explained that the cause of trouble in most cases of prostatic diseases is an enlarged prostate gland and that petitioner's preparation, which acted principally as an irritant, was essentially worthless in the treatment of prostate enlargements or infections (R. 67-68, 81, 83, 85-87). He pointed out further that inflammation of the prostate gland may result from infections in other parts of the body and that the symptoms described in petitioner's advertising matter may also be due to other ailments (R. 68-73). In either event the use of petitioner's preparation was considered of no value (R. 68-73). Petitioner introduced no medical or other scientific evidence to explain the manner in which his preparation would provide relief for pros-

tate disorders or their symptoms but relied principally on his own experience and the testimonials of other users (R. 92-132).

The trial examiner found that petitioner's "advertising matter as a whole does lead and induce readers to believe that this suppository will overcome and eliminate prostate gland trouble and the symptoms said by the respondents [petitioner] to be produced by such disorder" and "that the presale representations made concerning this product are false and fraudulent" (R. 33, 37). The trial examiner's report was approved and transmitted to the Postmaster General by the Solicitor of the Post Office Department with the recommendation that a fraud order be issued (R. 38). The fraud order based upon the trial examiner's report and the Solicitor's recommendation was duly issued by the Acting Postmaster General (R. 26-27). The order of the District Court denying petitioner's prayer for an injunction was affirmed by the court below on the ground that "the order of the Postmaster General, of which the appellant complains, was fairly arrived at, has substantial evidence to support it and is not palpably wrong or arbitrary" (R. 205).

ARGUMENT

In reviewing the evidence on which the fraud order was based and in upholding its issuance the court below properly applied standards enunciated by this Court in a situation virtually identi-

cal to that presented in the instant case. *Leach v. Carlile*, 258 U. S. 138. Whether these standards were properly applied involves a determination essentially of a factual character which hardly presents a question for review by this Court, especially when the court below expressly (R. 205) and the District Court by plain implication (R. 194) found that there was substantial evidence to support the Postmaster General's fraud order. In any event, the only scientific evidence before the trial examiner could justify no other conclusion than that the claims made for petitioner's product were false.

Petitioner's contention that this conclusion was improper as in the realm of opinion (citing *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94) runs afoul of this Court's decision in *Leach v. Carlile*, *supra*, that the determination of whether claims for a medicine are so exaggerated as to perpetrate "a fraud upon the public * * * was a question of fact which the statutes cited committed to the decision of the Postmaster General" (p. 139). Whether or not the efficacy of the treatment advertised in the *McAnnulty* case was capable of reduction to a question of fact, it is clear from the *Leach* case that qualified experts may testify with respect to the therapeutic qualities of medicines and that fraud orders may be based upon false and fraudulent representations with respect to these qualities.

Adherence to the doctrine of the *Leach* case does not, we submit, constitute a ground for review.²

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1948.

² *Farley v. Heining*, 105 F. 2d 79, 81-82 (App. D. C.), certiorari denied, 308 U. S. 587; *Farley v. Simmons*, 99 F. 2d 343, 347-348 (App. D. C.), certiorari denied, 305 U. S. 651.

APPENDIX

R. S. § 3929 (39 U. S. C. 259), as amended by the Act of September 19, 1890, c. 908, § 2, 26 Stat. 465, 466, provides as follows:

SEC. 3929. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any postoffice at which registered letters arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster-General may prescribe. But nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. The public advertisement by such person or company so conducting such lottery, gift enterprise,

scheme, or device, that remittances for the same may be made by registered letters to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way satisfactory to himself.

R. S. § 3929 was further amended by the Act of March 2, 1895, c. 191, § 4, 28 Stat. 963, 964, to cover not only registered letters but all letters or other matter sent by mail:

SEC. 4. That the powers conferred upon the Postmaster-General by the statute of eighteen hundred and ninety, chapter nine hundred and eight, section two, are hereby extended and made applicable to all letters or other matter sent by mail.

R. S. § 4041 (39 U. S. C. 732), as amended by the Act of September 19, 1890, c. 908, § 3, 26 Stat. 465, 466, provides as follows:

SEC. 4041. The Postmaster-General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, forbid the payment by any postmaster to said person or company of any postal money-orders drawn to his or its

order, or in his or its favor, or to the agent of any such person or company, whether such agent is acting as an individual or as a firm, bank, corporation, or association of any kind, and may provide by regulation for the return to the remitters of the sums named in such money-orders. But this shall not authorize any person to open any letter not addressed to himself. The public advertisement by such person or company so conducting any such lottery, gift enterprise, scheme, or device, that remittances for the same may be made by means of postal money-orders to any other person, firm, bank, corporation, or association named therein shall be held to be prima facie evidence of the existence of said agency by all the parties named therein; but the Postmaster-General shall not be precluded from ascertaining the existence of such agency in any other legal way.